Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1977

No. 77-26

ELIZABETH JANE YOUNG CHIN,
Petitioner,

—against—

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF AND APPENDIX TO BRIEF FOR THE UNITED STATES

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PETITIONER'S REPLY BRIEF TO BRIEF FOR THE UNITED STATES

I.

The Double Jeopardy-Collateral Estoppel Issue

The Solicitor alleges that petitioner has failed to present a valid double jeopardy—collateral estoppel issue because:

1) Even though the first jury acquitted petitioner of any conspiracy or illegal agreement with the co-defendant Chin, the fact that it failed to agree on a verdict on the substantive charge based on the same evidence, permitted the whole case to be relitigated. This argument is advanced on the ground that the first jury could, if it so desired, have acquitted her on the conspiracy charge and convicted her on the substantive count. That verdict would have stood against a challenge of inconsistency because "consistency in verdicts is not required."

2) The first jury never really decided whether or not petitioner was a resident of New York at the time she transported one or more weapons from California to New York in that the jury failed to agree on the substantive count of the first indictment. It decided only that there was no agreement between the petitioner and Kenneth Chin to transport or receive the weapons in New York where at least one of the persons involved (Kenneth Chin) was a resident. Since the first jury did not finally resolve the residency issue, the argument goes, there is no collateral estoppel on that issue and petitioner's double jeopardy argument is doomed.

As to 1) above

Inconsistency in the decisions incorporated in the verdict of a single jury is expressly not repugnant as a doctrine of federal criminal law. See *Dunn* v. *United States*, 284 U.S. 390, 393 (1932)

> "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment."

cf. *Hamling* v. *United States*, 418 U.S. 87, 101 (1975), cited by the Solicitor.

Further dicta in *Dunn*—to the effect that the same rule of inconsistency applies to successive prosecutions on different indictments—have been, on the other hand, decisively declared in error by this Court in *Ashe* v. *Swenson*, 397 U.S. 436 (1970). By the Court's ruling there on collateral estoppel, the government is henceforth precluded from relitigating any issue finally decided by a general verdict of a jury. The task then, in each criminal case where the claim of collateral estoppel is raised, is to determine what the general verdict of the jury involved; any issue necessarily decided by that verdict would not again be submitted to a new jury for decision. Moreover, *Ashe* directs an examination of the record of the prior

proceedings for the purpose of determining "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

The case of *United States* v. *McGowan*, 385 F.S. 956 (D.C.N.J. 1974), cited by the Solicitor, can be distinguished from the case at bar. In *McGowan* the defendant was indicted in a two-count indictment for violation of separate federal laws: (1) conspiracy to import marijuana into the United States (21 U.S.C. §§ 952(a), 960) and (2) conspiracy to distribute and/or possess marijuana with intent to distribute such marijuana (21 U.S.C. §§ 841(a) (1), 846). The jury acquitted the defendant on count 2 and disagreed on count 1. The District Court there was faced with two counts charging conspiracy violations of separate federal statutes. Insofar as there were different laws involving different factual proof, the District Court was correct in rejecting the application of collateral estoppel. However, insofar as the court held that the "jury acted irrationally" in acquitting on one count and disagreeing on the other, and insofar as it rejected the doctrine of collateral estoppel as a bar to retrial on the issues which the court thought decided by the acquittal, the court did not follow *Ashe* v. *Swenson*, which should be controlling in the case at bar. In order to protect its position, the *McGowan* court stated:

> "All relevant data simply fail to indicate that the jury must have found McGowan innocent of all conspiratorial involvement" (961).

In the case at bar, it is clear that the acquittal on the conspiracy count of the two-count indictment was a conclusive finding that petitioner at no time whatsoever agreed with, aided or abetted, or permitted Kenneth Chin to aid or abet her in the transportation or receipt of any weapon into the State of New York at a time when one or

the other were residents of that state. There could be no retrial on any issue which implied their joint illegal action in the transportation and receipt of the weapons described in the first indictment.

As to 2) above

The Solicitor argues that the failure of the first jury to acquit petitioner on the second and substantive count of the first indictment left open for further litigation the issue of her residency at the time when the weapon or weapons were "illegally" transported to New York City. Yet, in acquitting her on the first charge of conspiracy, the jury must have made a finding "at least partially" in favor of her claim that she had established a residence in California.

In order to acquit her on that charge, the jury had to over-ride prosecution evidence for their joint conspiracy; to wit: that petitioner and Kenneth Chin were both hunters, interested in hunting rifles; that they maintained and occupied an apartment together in Brooklyn, New York, in 1975 where three of the four weapons were found on October 4, of that year; that the fourth weapon, presumably obtained in California, was left for repair by Kenneth Chin while in petitioner's company at a hunting-gun shop in upper New York State in September, 1975.[1] The jury must, therefore have given credence and weight to evidence adduced from petitioner's father, who testified that in July of 1975 his daughter returned to her family home in California on a one-way ticket because she had a quarrel with Kenneth Chin and was going to start a new life in California where she filed for unemployment insurance and looked for work. When the jury acquitted petitioner of the conspiracy charge, it must have credited

[1] This same evidence was adduced at both trials.

this testimony of the father so that implicit in its verdict was the finding that the two (petitioner and Kenneth Chin) had gone their separate ways and were separated in the summer of 1975.[2]

The residency question is not, however, central to petitioner's double jeopardy claim. The double jeopardy arises from the fact that the superseding eight-count indictment, lodged immediately after her acquittal on the conspiracy charge, accused her of joint action with co-defendant Chin. Even though that indictment did not charge conspiracy in *haec verba*, it accused her of joint illegal action with the co-defendant in that the two together "knowingly and willfully" violated the law. Moreover, petitioner further asserts that the record of the second trial, itself, supports this contention since the issue of aiding and abetting—in this instance the aiding and abetting of her alleged illegal acts by Kenneth Chin—was argued to the jury. The court later instructed the jury that they could find from the evidence that he did aid and abet her (Tr. II 789-795). The finding was then confirmed when the jury found him guilty of both transporting and receiving weapons in violation of the statute and as a principal with her.

The theory of the government's case at both trials was that the crime of transporting and receiving the weapons transported from California to New York where both of them resided was a joint crime, conceived of and executed by the two acting in concert. This theory did not change after petitioner's acquittal of conspiracy. When the

[2] Although the government adduced substantially the same evidence at both trials, the court capriciously and prejudicially ruled that petitioner could not introduce evidence, through her father's testimony, of the quarrel, the one-way ticket, the looking for work and the unemployment insurance at the second trial. See p. 5a *infra*.

government brought in its new superseding indictment alleging only substantive counts, it continued to adhere to the same theory of the case.

At the second trial, the prosecutor argued in summation that the two acted together. (Tr. II 657, 658, 660, 716). The court underlined the prosecution's theory of the case by expressly instructing the jury on aiding and abetting (Tr. II 789-795), the court then submitted to the second jury the same theory of joint action on which the first jury had acquitted petitioner.

Although the Solicitor attempts to distinguish *Sealfon* v. *United States*, 332 U.S. 575 (1948) from the facts in the case at bar, the cases are startlingly similar. A distinction without a significant difference perhaps can be made in that Sealfon was tried alone and acquitted first for conspiracy (as was petitioner) to defraud the United States by presenting false invoices and thereafter at the second trial was charged with aiding and abetting the publishing of the same false invoices introduced at the conspiracy trial. The case at bar is analogous, except that at petitioner's second trial, the jury was instructed and found that she was aided and abetted by the co-defendant in her criminal activity—a finding which should have been deemed *res judicata* in her favor at the first trial. See *United States* v. *Williams*, 341 U.S. 70 (1951), concurring opinion of Justice Black p. 85.[3] Put conversely, the second jury verdict was a ruling that she could not have committed the crime without the aiding

[3] Although it is not necessary for decision in this case, petitioner is prepared to concede on the double jeopardy issue that a new trial might have been appropriate on a new indictment limited to the issue of whether she had acted alone in violating the statute. Again, however, petitioner would plead that a prior jury had ruled at least partially on the residence issue in accepting her leaving the bed and board of Kenneth Chin in New York as a temporary abandonment of her New York residence.

and abetting of the co-defendant who, by such aiding and abetting, became a principal. Just as in *Sealfon*, "the basic facts in each trial were identical." *Robinson* v. *United States*, 175 F.2d 4 (9th Cir. 1949) and *United States* v. *Curzio*, 170 F.2d 354 (3rd Cir. 1948), cited by the Solicitor, are inapposite. *Robinson* restates the federal rule that a criminal jury may render an inconsistent verdict. In *Curzio*, as distinguished from the case at bar, the substantive counts subsequently tried after an acquittal of the defendant on a conspiracy charge, did not necessarily involve a charge of joint illegal action as appears in the record of the instant case, cf. *United States* v. *De Angelo*, 138 F.2d 466 (3rd Cir. 1943).[4]

II.

As to the Validity of the Search Warrant

The Solicitor concedes on this issue that "the question is close." A review of the record, itself, discloses that the government has predicated its position on theories and law which have no foundation in fact in that record. The Solicitor states:

> "The warrant was issued on the basis of an affidavit executed by Secret Service Agent Neal Findley, stating that he had reason to believe that in purchasing the weapon Elizabeth Chin had used a driver's license which *falsely represented* that she

[4] Petitioner notes the Solicitor's confession of error as to the guilt of co-defendant and co-petitioner Kenneth Chin. "Our review of the record compels us to agree with petitioner [Kenneth Chin] that the evidence was insufficient." It was nonetheless the second jury's finding after submission of all the evidence, and the court's charge that that jury found that *both* defendants acted together and were guilty. The government must have believed it had a stronger case linking them and trying them together, since it had failed to convict petitioner when she was tried alone.

was a resident of California" (emphasis supplied) (Sol. Br. 10).

The Section of law allegedly violated requires a "false or fictitious . . . statement . . . misrepresented identification, intended or likely to deceive such . . . dealer . . . with respect to any fact material to the lawfulness of the sale." (18 U.S.C. § 922(a)6). A perusal of the affidavit of Findley of October 3, 1975 (Amicus Brief of Asian-American Legal Defense and Education Fund, hereinafter Amicus Br., A1-A3) discloses no statement whatsoever by Findley that petitioner made any false or fictitious statement, nor that such statement was material or calculated to deceive. The affidavit is barren of any allegations that petitioner had in fact violated the law cited. At the very most, the affidavit alleges that petitioner bought a firearm in California and exhibited a driver's license bearing her true name, but having a California address when she had apparently moved from California to New York. No federal crime was alleged to have been committed and particularly no illegal intent was alleged; nor was she ever indicted under the section of law referred to merely by number (18 U.S.C. § 922(a)6).

It is necessary for the validity of a search warrant that illegal conduct of some sort be specifically described. This did not occur here; the affidavit, on this ground alone, was accordingly insufficient.

Moreover, even if it were to be presumed, *arguendo*, that Findley intended to state that petitioner had "falsely represented" her address with the intention to deceive, even then, there was no allegation that the crime committed bore any logical connection to the premises to be searched 3000 miles away from the scene of the alleged crime. In *United States* v. *Ramirez*, 279 F.2d 712, 715 (2d Cir. 1960), the court said:

". . . an affidavit is insufficient if the affirmations of fact bear no logical relevance to the commission of a crime on the premises to be searched."

The Solicitor sets forth a series of inferences which must be made to support "the magistrate's conclusion that evidence of that crime—the semi-automatic rifle—would probably be found in petitioner's apartment." [5]

The cases cited by the Solicitor to support the appropriateness of the inferences to be drawn that the rifle would be in petitioner's home, far from the place of purchase and 66 days later, are all inapposite. The affidavits there in question all involve more facts asserted in support of the warrant, and allegations, not only of the commission of a crime, but of serious crime. viz. *United States* v. *Mulligan*, 488 F.2d 732 (9th Cir. 1973) (burglary of a bank, items found in automobile connecting defendant to the burglary and $98,600 found buried near defendant's residence); *United States* v. *Lucarz*, 430 F.2d 1051 (9th Cir. 1970) (theft of mail, materials "one would expect to find hidden at appellant's place of residence because of their value and bulk"); *United States* v. *Rahn*, 511 F.2d 290 (10th Cir. 1975) (theft of firearms); *United States* v. *Steeves*, 525 F.2d 33 (5th Cir. 1975) (recent robbery of a bank); *Bastida* v. *Henderson*, 487 F.2d 860 (5th Cir. 1975) (armed robbery).

In addition to the affidavit of Findley discussed above, a supplemental affidavit which was sealed was submitted to the magistrate in support of the search warrant.[6] It was this affidavit which contained the admitted falsehoods.

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[5] Petitioner, of course, contends that "that crime" is never described in the affidavit.

[6] Upon motion of defense counsel, a substantial portion of its contents was revealed. A portion of the affidavit still remains sealed. (Amicus Br. A6-A7).

Findley had alleged that during 1973 petitioner had resided at a specific address in Los Angeles with Joanne Miyamoto. Findley stated that the source of his information was the examination of postal records *and* an independent examination by the Federal Bureau of Investigation. This was a pivotal allegation because it made the link to the inflammatory charge that petitioner was a threat to the Emperor of Japan. This was also the affidavit which contained the accusation that her "involvement . . . poses a serious threat to the personal safety of the Emperor of Japan and others during the official visit to the United States." (Amicus Br. A6).[7] The allegation that petitioner had, at any time, lived with Ms. Miyamoto was untrue; any checking as alleged would have revealed this fact. It was a material and, if not deliberate, reckless statement with no justification, but the support it offered to the still more reckless attempt to link the petitioner to the prospect of an event that haunted the Secret Service.

The District Court in upholding the validity of the search warrant ruled that any misrepresentation or falsehood in the supplemental affidavit was inconsequential since the original affidavit was sufficient to establish probable cause. The court, however, had before it the vigorous contentions of defense counsel, supported by affidavit, that the government had demonstrated a "reckless disregard of the truth." See affidavit of William Leibovitz, p. 11a, *infra*.

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[7] Although the affidavit was sealed, the Secret Service advised the media that petitioner and the co-defendant posed a threat to the life of the Emperor of Japan. This occasioned front page newspaper coverage and wide publicity in New York and all over the world. A few days later the Secret Service withdrew from the case, and the first indictment charging only violation of 18 U.S.C. § 922(a)3 was filed.

Accordingly, it is puzzling to read the Solicitor's statement,

> "there is no suggestion here that the misstatement was a deliberate misrepresentation. It was at worse a negligent misstatement, and since its content was wholly immaterial to the establishment of probable cause to believe that petitioner had violated 18 U.S.C. 922 (a) (6)—the ground on which the magistrate issued the warrant—there is no support for petitioner's claim on account of the misstatement." Sol. Br. 16.

The cases cited by the Solicitor, *United States* v. *Evers*, 552 F.2d 1119 (5th Cir. 1977) and *United States* v. *Taxe*, 540 F.2d 961 (1976), refer only to omissions of fact in an affidavit, not to misrepresentations alleged to be material to the issues and recklessly made. Despite the fact that counsel raised the issue of good faith, there was no factual determination below of whether or not there was a reckless and material misstatement of fact. Petitioner's request for a hearing was denied.

The Second Circuit has ruled that a negligent misstatement will upset a warrant only if its allegations are material. *United States* v. *Bozza*, 365 F.2d 206, 223-224 (2d Cir. 1966); *United States* v. *Pond*, 523 F.2d 210 (2d Cir. 1976); *United States* v. *Gonzalez*, 488 F.2d 833-837, 838 (2d Cir. 1973). Other circuits have held that a false statement, even if not material, can "eviscerate the existence of probable cause." *United States* v. *Hunt*, 496 F.2d 888, 894 (5th Cir. 1974); cf. *United States* v. *Damitz*, 495 F.2d 50 (9th Cir. 1974); *United States* v. *Belculfine*, 508 F.2d 58, 60-63 (1st Cir. 1974); *United States* v. *Prewitt*, 534 F.2d 200, 202 (9th Cir. 1976). Since it was contended that the government had sought a search warant in bad faith, relying on the inflammatory nature of the accusation that petitioner threatened the life, safety and security of the Emperor of Japan, and

since any magistrate would be bound to give credence to a good faith accusation of such seriousness by the prestigious Secret Service, the court below should have, at the very least, held a hearing to determine this issue. Agent Findley's falsehood, claiming petitioner had lived with Joanne Miyamoto established the only link between petitioner and the visit to this country of the Emperor of Japan. Since there is a conflict in the Circuit Courts of Appeal on this issue, i.e. whether a negligent and/or immaterial—not to mention reckless and material—misrepresentation will invalidate a search warrant, the issue is important for decision by this Court.

III.

As to the Improper Instruction that "Residence" under the Statute Means Domicile

The Solicitor appears to concede that the trial court erroneously instructed the jury that, under the Statute (18 U.S.C. § 922 (a) 3), "residence" means "domicile" (Sol. Br. p. 18), but contends, nevertheless that such instruction "to the extent mistaken could not have affected the verdict." This was true, said the Solicitor, because petitioner's defense was that "she had abandoned her residence in New York" and had gone to California to relocate permanently. (Sol. Br. 17). Said the Solicitor,

> ". . . the crucial issue was whether Elizabeth Chin had become a resident of California when she went there for several weeks in the summer of 1975." (Sol. Br. 17)

Petitioner's position was not quite as set forth by the Solicitor. She contended at both trials that while she resided in New York she had a continuing residence in California where she was born and received her education and where her parents, imbued in the Chinese tradition

(she is a first generation American-Chinese), considered that the home of an unmaried female (she was unmarried in 1975) is always with her parents (Tr. II 516, 517, 9a *infra*). In addition, and in the alternative, she contended that she had abandoned her New York residence with the co-defendant Chin because she had quarreled with him and, at least in advance and for the several weeks she was in California, intended to remain in California indefinitely and secure employment there.

Based on these alternative theories of her defense, petitioner offered an instruction which the trial court denied:

> "As used in the statute 'residence' means broadly, presence as an inhabitant in a given place, not as a transient, but either indefinite as to time or for a purpose that is of such a nature that an extended stay may be necessary for its accomplishment, although the person may at all times intend to return to his or her domicile at some time in the future." (Request No. 4, Tr. II 580)

Moreover, petitioner further requested instructions to the jury consistent with regulations issued by the Department of the Treasury (Bureau of Alcohol, Tobacco and Firearms). See Petition for Certiorari 16, 17. If proper instructions on residence had been given, the jury could have considered the evidence concerning petitioner's residence in a different light—that she had two residences—one in New York, and the other in California, and that her move from the California residence to her New York residence (when she decided to return) was such that she was taking her belongings (including her hunting rifle) with her.

Instead, the court instructed the jury in strong language—equating domicile with residence and suggesting

the requirement of an immutable intention to establish a domicile which foreclosed any concept of dual residency. Viz.

> "Residence, as used in the statute is defined in legal terms as domicile . . . You can have any number of homes . . . But you can only have one residence, as I am defining it, for the purpose of this statute . . . Residence as used in this statute, means the place where the individual dwells, regarding it as his or her home as distinguished from other places. It is the place where one intends to live for an indefinite time . . . Domicile is usually the place where you have your personal effects, your belongings, your household goods, your valuables." (Tr. II p. 797-798)

The court went on in this vein at great length and, by its instructions, read out of the statute the possibility that a person might have two (or more) residences simultaneously. Moreover, because petitioner was in California for a relatively short period of time (a little more than four weeks), the court telegraphed to the jury that such a short period of time under the circumstances of this case could not mean a change in domicile which connotes a more permanent change.

In this regard, the court demonstrated its own prejudice against petitioner and her case; it foreclosed testimony about her reason for leaving New York and going to California—testimony which the court had permitted at the first trial. Appended pp. 1a-10a, *infra* are pages from the record of the first trial and the second trial which show how the court itself erroneously diminished petitioner's defense.

IV.

The Court's Disregard of Congressional Purpose and its Interference with Summation by Petitioner's Counsel

The Solicitor misdirects his argument on the issue of Congressional intention. That Congress, in fact, did not intend to unduly hamper the activities of legitimate hunters is clear from the floor debates in Congress on the Omnibus Crime Control and Safe Streets Act of 1968. Despite the amendment of the Act to include rifles and shotguns, Congress again took pains to make exceptions for hunters, showing its continuing concern that hunters themselves not be made targets of the proscriptive law. See Sol Br. 19, n. 12.

In its charge, the trial court did refer to the intent of Congress in passing the law, of which Section 922(a) 3 is a part. It said that the congressional purpose was "to closely supervise the manufacture, sale and transportation of certain weapons" (Tr. II 781), but refused, although requested, to mention the express Congressional intent and its preamble that made clear that the Act was not directed against legitimate hunters.

Evidence had been introduced by the prosecution that petitioner and the co-defendant were hunters, that they had state hunting licenses and disposition notices covering weapons in their possession, and that in addition, they paid their bills promptly (Tr. II 366, 373, 374-378, 420-423, 427, 320, 347, 402-406).

The Prosecution had also told the jury, without any foundation, that certain of the weapons were of a "military" character (Tr. II 6, 7). Nonetheless, not only did the court fail to mention the expressed intent of Congress not to make legitimate hunters the target of the criminal law, but it interfered with counsel's appropriate argument based on the evidence that had been adduced by the

prosecution—that defendants were hunters and law-abiding. The court compounded its error in this regard by intervening in the summation by defense counsel and criticizing her for making mention of these facts in evidence. This telegraphed to the jury the court's prejudice. Finally, in a manner which deprived the defendant of her attorney's advocacy and accordingly of due process of law, the court, having criticized counsel, dramatically interrupted the summation, sent the jury out of the room and threatened petitioner's counsel with contempt of court p. 18a, *infra*. The trial judge capriciously and unfairly forbid defense counsel from making legitimate argument. This was a deprivation of the right of the defendant to have her counsel sum up. *Herring* v. *New York*, 422 U.S. 853 (1976).

The Solicitor did not respond to this point which is set forth in the petition as part of Question 3.

CONCLUSION

The petition of Elizabeth Jane Young Chin should be granted.

Respectfully submitted,

ELEANOR JACKSON PIEL,
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Elizabeth Jane Young Chin

December, 1977

APPENDIX TO REPLY

Excerpts From First Trial of Testimony of Petitioner's Father, Charles Young on Issue of her change of residence

[339] Q. Did there come a time in 1975 when your daughter returned to Hanford? A. Last year, a little bit after the 14th of [340] July.

Q. That was 1975? A. 1975.

Q. What were the circumstances of that——

Mr. Levin-Epstein: Objection.

Q. Did you have a conversation with your daughter about her return when she returned to California in 1975?

Mr. Levin-Epstein: Objection.

The Court: I'll allow it. Yes or no.

A. She——

The Court: No, yes or no.

A. Yes.

Q. What was that conversation?

Mr. Levin-Epstein: Objection.

The Court: Does it relate to the reason for her return to New York?

The Witness: (No response.)

The Court: From New York?

The Witness: Yes.

The Court: Tell us what she said with reference to returning to California from New York?

The Witness: She said she's breaking up with Kenny and she wants to work in California.

[341] Did you have a conversation about where she would work? A. Yes.

Mr. Levin-Epstein: Objection. What does that——

Excerpts From First Trial of Testimony of Petitioner's Father, Charles Young on Issue of her change of residence

The Court: Overruled. I'll allow it.

Q. What was that conversation?

The Court: Objection sustained. Did she actually work in California?

The Witness: She was in Los Angeles. She stayed one week with me and she could not find employment. She signed for her unemployment insurance in Hanford and a check on unemployment. Of course at that time instruction——

The Court: No, I want to know whether she ever worked in California.

The Witness: I do not know. I do not know.

The Court: Did you offer her a job in one of your supermarkets?

The Witness: Yes, but she didn't want any part of it.

The Court: Go ahead.

Q. She stayed with you and—Strike that. Then did there come a time sometime after [342] she left your home and after she applied for unemployment insurance when you heard from her about going back to New York? A. Somewhere within about—a few weeks, about two or three weeks she called on the phone, she called on the phone and said she's going back to New York.

Q. When would you say that was? A. Oh, let's see, about the first or middle part of August, something like that.

Q. Then thereafter did she return as far as you know? A. Well, she called us and after she reached New York, she called us again saying she arrived.

* * * * *

Excerpts From Second Trial of Testimony of Petitioner's Father Charles Young and Colloquy on Issue of Residence

[497] BY MS. PIEL:

Q. Did there come a time in 1974, when Mrs. —— or when your daughter returned to New York——

Mr. Levin-Epstein: Objection, as leading.

The Court: I will allow leading questions as long as they are proper.

Q. ——in 1976? A. Well, they not finding satisfactory work in Los Angeles——

Mr. Levin-Epstein: Objection, not responsive.

The Court: Strike it out as not responsive. Did she return to New York?

The Witness: She returned to New York.

Q. Did there come a time in 1975, when your daughter came back to Hanford, to your home? A. In middle July of '75, she came back home.

Q. And did she bring—strike that. Did she have a conversation with you about her intention at that time?

[498] Mr. Levin-Epstein: Objection.

The Court: Just yes or no.

Mr. Levin-Epstein: Objection withdrawn. Yes.

And what was that conversation about——

The Court: Objection sustained.

Ms. Piel: I'd like to be heard, your Honor.

The Court: The Jury may be excused.

(Jury excused.)

Excerpts From Second Trial of Testimony of Petitioner's Father Charles Young and Colloquy on Issue of residence

(The following occurred in the absence of the Jury.)

Ms. Piel: At this time, your Honor, I wish to ask this witness about his conversation with his daughter in 1975 to show her state of mind with regard to her intention to return to California to establish her residence, and it seems to me that is an exception to whatever rule or, rather, to any hearsay rule because it's not to show the truth of the matter, but her state of mind, and intention.

The Court: Isn't it true that on the state of mind of the defendant, as to whether she intended to reside in California, that is admissible?

Mr. Levin-Epstein: The Court's ruling at the last trial was such.

[499] I objected at that time on the basis of hearsay because I don't think it is possible to distinguish between state of mind and the testimony of this witness.

The Court: You are just assuming the witness is lying.

Mr. Levin-Epstein: Absolutely not. I think the opposite——

The Court: I am talking about his testimony concerning what his daughter said.

Mr. Levin-Epstein: I am afraid the Court misunderstood my point.

I don't object to the state of mind of Mrs. Chin —Miss Young being offered in evidence as part of the defendants' case.

Clearly, the isue of residence has to do with the state of mind, knowledge and intent.

Excerpts From Second Trial of Testimony of Petitioner's Father Charles Young and Colloquy on Issue of residence

My only concern is that this witness, upon being asked questions such as the kind Ms. Piel is framing, is going to be volunteering to this Jury matters not within the scope of the case.

The Court: You are directed to answer questions concerning your daughter only as to what she said concerning her intention as to where she [500] was going to reside—not the reason—not that she had a fight with Kenneth Chin and that's the reason.

You may testify she said she was coming to California to stay.

Why, is not proper on state of mind.

Ms. Piel: It seems to me that the fact she said she had a fight with Kenny is appropriate to show her state of mind.

The Court: I won't take that. You have an exception.

Ms. Piel: She was living with Kenny and established her residency in New York—I haven't challenged that—as of 1974, and into the early part of '75, and the only basis on which one can show a state of mind is that for some reason she decided to establish a separate residence.

Therefore, it is very important to show that she had some disagreement.

The Court: I won't allow it. The reason for the state of mind is not the state of mind.

I will allow him to testify that she said she was coming to California.

Excerpts From Second Trial of Testimony of Petitioner's Father Charles Young and Colloquy on Issue of residence

I will not permit any testimony over objection [501] by the Government that she had a fight with Kenny and therefore, she decided to come to California. And I don't want any testimony about his disapproval with the relationship.

You shall be confined to the issues in the case as is the Government and not the collateral issues.

Ms. Piel: I would like to make an offer of proof, that if permitted to testify, he would testify she had a fight, a disagreement with her husband, had a conversation with her father; that her father had expressed to her during that conversation that he disapproved of her living with a man to whom she wasn't married; had this fight with Ken over that issue, and told her father she was returning to California with a definite intention to reside either with him or in Los Angeles or somewhere in California.

The Court: I will allow so much of it that indicates that she intended to live in California permanently.

I will not allow his disapproval of the relationship or that she had a fight with Kenny and——

Ms. Piel: You allowed me to say that in my [502] opening statement and now my case is prejudiced——

The Court: Was there objection then?

Ms. Piel: No.

The Court: You are not allowed to introduce testimony because you made statements in your opening you shouldn't have made.

Excerpts From Second Trial of Testimony of Petitioner's Father Charles Young and Colloquy on Issue of residence

Ms. Piel: The point is that it is relevant, not irrelevant.

The Court: I find it is not.

Seat the jury.

(Jury present.)

The Court: Proceed.

By Ms. Piel:

Q. Mr. Young, upon your daughter's return to California in the middle of July of 1975, alone, did she have a conversation with you? A. She wanted——

The Court: Did she have a conversation with you—yes or no?

The Witness: Yes.

Q. What was that conversation?

The Court: I wan' a leading question here.

Objection sustained.

Q. Did your daughter say to you that she was [503] returning to California to make her home with you or somewhere in California, and that she was leaving New York? A. Yes.

Q. And did she tell you that it was her intention to establish her residence in California? A. Yes.

The Court: Did she tell you she was giving up her New York residence and coming to California to live there?

The Witness: Yes.

Q. And did she stay with you for a period of time? A. About a week, 10 days.

Excerpts From Second Trial of Testimony of Petitioner's Father Charles Young and Colloquy on Issue of residence

Q. And then what did she do? A. She left for Los Angeles.

Q. And how long did she stay in Los Angeles? If you know. A. About a month, I think.

Q. And did you receive a telephone call from her at some point? A. About the middle of August.

Q. And did she—and did you later then receive a telephone call from her from New York? A. After she got back to New York.

* * * * *

Cross examination by Ethan Levin-Epstein

[516] Q. Would it be fair to say, sir, that when you speak of your "home," that in your mind your home, again in quotations, will always be at least in one respect all of your children's home? A. Yes.

Q. And would it also be fair to say, sir, that when you speak of your residence—let's leave it at that—your residence in your business dealings, you have a different meaning in your mind than when you speak of "My daughter is coming home," or words to that effect? A. The Chinese is a little different. Until our children are married, even they are 80 years old, this [517] is their home.

Q. As far as you're concerned; is that correct? A. Right.

Q. And this is a tradition longstanding within the culture; is it not? A. Yes.

Q. And yet, when your daughter graduated from college, although there was always a place for her in your home, as you put it, she moved to New York, did she not? A. Against our wishes.

Q. But she did, nevertheless? A. Yes.

* * * * *

[523] The Court: Mrs. Piel.

Ms. Piel: Yes, I would like to be heard before I proceed on redirect.

The Court: The jury is excused.

(At 11:10 A.M. the jury left the courtroom.)

Ms. Piel: Your Honor will recall earlier in my [524] offer of proof, after you sustained my objection——

The Court: I heard everything you said, so start from there.

Ms. Piel: I said that this witness would testify that Elizabeth Jane Young Chin or Young then,

came home and said she had a fight with her—with Kenneth and that she had come home to California to live.

Now your Honor excluded or directed this witness not to mention anything about either the fight or his disapproval of their relationship——

The Court: That is right.

Ms. Piel: Now Mr. Levin-Epstein—and you directed the witness not to say it even if I were to ask the question——

The Court: I heard everything I said. I was listening very carefully to everything I say——

Ms. Piel: Now Mr. Levin-Epstein asked this witness on cross-examination, Did Miss Young say to her father I want to live with you forever.

Now when he asked that question, he opened the door for me to ask Mr. Young on redirect what the conversation was.

I submit I now have a right to ask Mr. Young and Mr. Young now has a right to answer me that in the [525] conversation he had with his daughter she reminded him or he reminded her of his disapproval of that relationship and she said, "Yes, I had a fight with him on that issue and I have returned to California"?

The Court: Mrs. Piel, I don't think it means a tinker's dam to either side, but you are very persistent and I will not give you your point just because you are repeating and arguing vigorously for it.

Denied. I don't think it means anything in this case, but you are not going to get your point just because you are arguing for it and just because you repeat it now.

Seat the jury.

* * * * *

Affidavit of William Leibovitz Filed in support of petitioner's motion to suppress

STATE OF NEW YORK)
COUNTY OF NEW YORK) : ss.:

I, William Leibovitz, having been duly sworn depose and say:

1. I submit this supplemental affidavit in support of the motion by defendant Kenneth R. Chin to set aside the search warrant and to suppress and return evidence obtained by unlawful search and seizure.

2. Since the filing of my original affidavit, sworn to on December 12, 1975, the government has in part disclosed to defense counsel the contents of the supplemental affidavit of Special Agent Neal Findley, which was considered by the Magistrate who issued the search warrant herein. Paragraph 2 of the latter affidavit has been deleted and remains undisclosed to counsel and defendants. The government informed this Court on December 19, 1975 that it would rely only on the public affidavits, and not on the undisclosed portion, in the Court's determination of this motion.

3. The government also conceded to the Court on December 19, 1975, that no information beyond the foregoing affidavits of Agent Findley was presented to the Magistrate who issued the warrant.

4. On information and belief based on my discussions with Kenneth R. Chin, my own investigation, and my conferences with counsel for codefendant Young who, in turn, have discussed this matter with each other as attorney and client, the public portion of the supplemental affidavit of Agent Findley contains material misstatements that are intentionally, recklessly, or negligently untrue on the part of the affiant.

5. Paragraph 5 of the aforesaid affidavit asserts, as a ground for issuance of the warrant, that the defendants

were connected with a "serious threat to the personal safety of the Emperor of Japan and others during the official visit to the United States." In fact, such was never the case, which Agent Findley had ample opportunity and reason to learn and know in the ordinary and prudent exercise of his duty.

6. The intended visit of the Japanese Emperor to the United States was obviously known well in advance by the Secret Service. The Secret Service also knew where the defendants resided in Brooklyn, New York. Moreover, it claims to have had sufficient opportunity to investigate codefendant Young's postal records in California (Suppl. Affidavit, par. 1). Nevertheless, Agent Findley gives no evidence of having conducted any surveillance of the defendants personally to determine the truth or falsity of the claim made in his affidavit that the defendants were connected with a threat to the Emperor's or others' personal safety.

7. Both before and after the arrival of the Japanese Emperor the government, including Agent Findley and other agents, would have had every opportunity to establish close personal surveillance of the defendants in order to detect any relevant suspicious conduct. Every action of the defendants outside of their residence could have been followed 24 hours per day. Any meeting of the defendants with other persons suspected of any wrongdoing could readily have been noted through such surveillance. Any threatening behavior could thereby easily have been observed by Agent Findley and other trained agents of the Secret Service.

8. Moreover, in particular, the slightest effort by the defendants to go anywhere or do anything that appeared, however remotely, to be preparatory to making any physical contact with or otherwise causing any threat to the Japanese Emperor could instantaneously have been followed inch by inch through appropriate surveillance.

9. Nevertheless, Agent Findley recklessly disregarded these obvious means of learning the facts. His affidavits contain no evidence that he pursued any surveillance of the defendants themselves to determine the truth. Instead, his supplemental affidavit relies on irrelevant references to other persons, supposedly affiliated with "extremist" groups, one of whom allegedly was acquainted with co-defendant Young in the past, but who are not alleged to have any other relevant connection with her or with defendant Chin.

10. A good faith effort by Agent Findley to determine the available facts would readily have negated his "opinion" that the defendants posed a threat to the Japanese Emperor. In fact, immediately after execution of the search warrant and even before the defendants' arraignment by the U.S. Magistrate, the Secret Service removed itself permanently from the case and transferred it to the Bureau of Alcohol, Tobacco and Firearms. If the defendants had been found to pose a threat to the Emperor, the Secret Service by law would have been obligated to maintain responsibility. At the time of such transfer of the case, the Emperor was still in New York City and was scheduled to remain in the United States, and did so, for several additional days. The defendants were released on bail before the Emperor's departure from the United States. No charges were brought against the defendants, either in the original complaint or in the pending indictment, relating them in any respect to a threat upon the safety of the Japanese Emperor or others.

11. What would have been revealed to Agent Findley by any good faith, direct surveillance of the defendants is exemplified by the provable events of October 4, 1975, on the morning of their arrest. While their residence was being searched Ms. Young was attending a weekly four-

hour class in plumbing at Local No. 1 of the Plumber's Union in Brooklyn, New York where she has been an indentured trainee of the Union. Such facts were and are readily verifiable by the government. At the same time defendant Chin was doing the weekly household shopping and was arrested upon returning to the residence carrying large bundles of groceries. Such were the defendants' activities on the first day of the Japanese Emperor's arrival in New York City. Obviously, they were not engaged in threatening the safety of His Excellency, as Agent Findley had alleged without benefit of any previous direct surveillance of these defendants. His failure to conduct any such surveillance before swearing to an "opinion" of the serious threat allegedly posed by them was a reckless disregard of the truth.

12. There has been no explanation by the government of the leak to the press which alerted various news media crews to be present at the scene of the execution of the search warrant on the morning of October 4, 1975. This incident immediately created prominent self-serving publicity for the Secret Service during a period in which that agency was actively undergoing substantial adverse publicity (and possibly undeserved) due to various unrelated mishaps in the performance of its duties. However, three days later The New York Times published an article concerning the arrest of these defendants, entitled: "No Link to Hirohito Seen in Arrest of 2" (N.Y. Times, Oct. 7, 1975, p. 39, col. 6.).

13. Paragraph 1 of Agent Findley's supplemental affidavit contains an additional specific material misstatement. It alleges that the Secret Service investigated postal records and found that in 1973 codefendant Young had "resided at 4303 Arlington Avenue, Los Angeles, California with one Joanne Miyamoto." The affidavit later characterizes Joanne Miyamoto as a questionable political activist, thereby seeking to establish a suspect relationship with codefendant Young by association.

14. On information and belief as set forth herein in paragraph 4, the aforementioned allegation of paragraph 1 of Agent Findley's affidavit is untrue. Codefendant Young resided at the said address, but Joanne Miyamoto did not reside there. Ms. Miyamoto resided at a separate residence with a separate address bearing no resemblance to the address of Ms. Young. Any postal records indicating the said residence of Ms. Young as the residence also of Joanne Miyamoto would be entirely false. It is submitted that no such postal record ever existed and that none was ever "revealed" to the Secret Service as alleged in the Findley affidavit. Such allegation is, therefore, false and was intentionally or, at best, recklessly misstated by the affiant.

WHEREUPON it is respectfully requested that the motion herein be granted or that a hearing be held to determine the facts.

/s/ WILLIAM LEIBOVITZ
/s/ WILLIAM LEIBOVITZ

Sworn to before me this
9th day of January, 1976.

/s/ Bertha V. Siegel

BERTHA V. SIEGEL
Notary Public, State of New York
No. 03-8987435
Qualified in Bronx County
Commission Expires March 30, 1976

Excerpts from Summation at second trial of Eleanor Jackson Piel, petitioner's counsel

[677]

* * * * *

Accordingly, she had every right not only to purchase the firearms but when she changed her mind or when she decided that she was going to return to New York, she was then changing her residence from California to New York and she had every right to take those two weapons to New York and the only way that you could—by any stretch of the imagination—be able to find Miss Young guilty would be to say that you disapprove of the fact that she is interested in weapons.

Now, you also heard from Mr. Benedicto, the Government's witness, that Miss Young, along with Mr. Chin, were hunters.

No one of you were asked individually what your opinion is of hunting. Personally I'm not a hunter, I don't like to hunt——

Mr. Levin-Epstein: I object to any extended argument on hunting.

The Court: Hunting has nothing whatever to do with this case. This case involves the transportation of guns from outside the State of [678] New York inside New York State, by a resident of New York State. It doesn't matter the reason. If you have no right to bring it in, then the reason you bring it in is irrelevant.

I ask you to not talk about Miss Young's or Mrs. Chin's hunting activity and would you do that as a personal favor.

Ms. Piel: As a personal favor, I cannot do it. If the Court directs me—

The Court: Then do it by direction of the Court.

Excerpts from summation at second trial of Eleanor Jackson Piel, petitioner's counsel

Order has not yet, during this trial, brought you into line, so I will order you not to.

Ms. Piel: Incidentally, ladies and gentlemen, I feel very deeply about this, ladies and gentlemen, and I hope there is not anything I have done in any way that will prejudice my client.

If I have made any mistake in anything that I have said, if I have in some way offended his Honor—

The Court: Nothing personal, Mrs. Piel, but I have a duty to manage this case and you have a duty to obey the directions of this Court and you, as a lawyer, should know that.

[679]

Now, continue.

Ms. Piel: I think that it cannot help but be in your mind that behind all of this, why is the Government bringing this case against these two law-abiding citizens, if they are engaged in legitimate activities and it was for that reason that I mentioned what I was not supposed to mention—

Mr. Levin-Epstein: Objection.

The Court: Objection sustained. Totally improper remark.

Deal with the evidence, Mrs. Piel.

Ms. Piel: I am doing my best, your Honor.

Why did the Government bring this case—

The Court: The Jury may be excused. I will call you right back in a moment.

(Jury excused. The following occurred in the absence of the Jury.)

Excerpts from summation at second trial of Eleanor Jackson Piel, petitioner's counsel

The Court: Ms. Piel, from the outset of this trial, you just refused to obey the orders of this Court.

Now, I have only threatened two lawyers in contempt of Court, never a woman before. You may well be my first one. Don't press it. You know it is improper to talk about selective [680] prosecution. There is no proof of that in the record. You have no right to talk about these law-abiding citizens. There isn't even any proof in the record that they are law-abiding citizens but I assume it is.

I quoted Judge Feinberg's decision or the portion of the decision in U.S. v. Jones, which says that kind of argument borders on the frivolous and I told you not to discuss that—not to talk about your clients as being law-abiding citizens, hunters, sportsmen and so forth.

You continue to violate the directions of this Court. I don't know how else to handle it.

I reprimanded you in front of the Jury and that seemed to do you no good at all, nor me.

Now, bring the Jury in.

I will seat you down in front of the Jury if you do it again.

(Jury present).

The Court. Now, please continue.

Ms. Piel: The evidence that the Government has presented on each one of the counts against Elizabeth Jane Young Chin is insufficient as a matter of law and as a matter of fact.